

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER 96-0328 ST**  
**Sales And Use Tax**  
**For Tax Periods: 1991 Through 1993**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

**ISSUES**

**1. Sales and Use Tax-Computer Software**

**Authority:** IC 6-2.5-3-2, Information Bulletin #8 (February 9, 1990)

**2. Sales and Use Tax-Manufacturing Electricity**

**Authority:** IC 6-2.5-5-5.1, Information Bulletin #55 (May 31, 1989) IC 6-8.1-5-1

**3. Sales and Use Tax-Services**

**Authority:** IC 6-2.5-3-2, IC 6-2.5-2-2

**4. Sales and Use Tax-Tax Included in the Sales Price**

**Authority:** IC 6-2.5-2-1(b)

**5. Tax Administration-Negligence Penalty**

**Authority:** IC 6-8.1-10-2

**STATEMENT OF FACTS**

Taxpayer is a manufacturer and wholesaler of electronic connectors. Taxpayer was assessed additional use tax after an audit of the tax period 1991-1993. Taxpayer timely protested the assessment and a hearing was granted. More facts will be provided as necessary.

**1. Sales and Use Tax-Computer Software****DISCUSSION**

Pursuant to IC 6-2.5-3-2, Indiana imposes an excise tax on the "storage, use, or consumption of tangible personal property in Indiana" unless sales tax is paid on the item at the time of purchase or rental or the item is used in an exempt manner. Taxpayer rented certain items of computer software during the audit period. Taxpayer contends that these transactions are exempt from the use tax because the transactions are actually the payment of a franchise fee rather than the rental of tangible personal property. Taxpayer relies on Information Bulletin #8 issued May 23, 1983. That Bulletin was reissued, however, on February 9, 1990 with the current explanation of the taxability of computer software. Pursuant to the currently effective Information Bulletin, the Department does not accept Taxpayer's argument that it is paying a franchise fee and is therefore exempt from the use tax. The transaction concerns the rental and use of tangible personal property. That tangible personal property is the computer software. Computer software is analogous to a book. A book is another method of imparting information or intellectual property to others. Its value as tangible personal property is primarily based on the information rather than the paper and binding. Secondly, the transaction includes the rental of the tangible personal property. The fact that Taxpayer called the transaction the payment of a franchise fee rather than the rental of tangible personal property does not change the fact that Taxpayer actually rented the program and the information contained in the program. Taxpayer rented canned software that merely needed some modifications to make it work on Taxpayer's hardware. The software was not specifically written for Taxpayer and was not usable only by Taxpayer.

**FINDING**

This point of protest is denied.

**2. Sales and Use Tax-Manufacturing Electricity****DISCUSSION**

Purchases of electricity in Indiana are subject to the sales/use tax unless they are "consumed in the direct production of other tangible personal property in his business of manufacturing" IC 6-2.5-5-5.1. Information Bulletin #55 (May 31, 1989) provides that all metered electricity used in a manufacturing facility will be considered exempt if the electricity is predominately (more than 50%) consumed in exempt uses. If the predominate use of the electricity is not in exempt uses, then the actual amount consumed in exempt uses is exempt. For 1991 to June 1992 the audit made an adjustment to Taxpayer's electric bills to add use tax. Taxpayer did not pay any use tax on these bills. For July 1992 through December 1993, Taxpayer paid tax and filed a claim for refund that was paid. Taxpayer alleged that electricity in its facility was predominately used in an exempt manner and therefore none of the purchases of electricity were subject to tax. Taxpayer offered to present a utility study performed by an engineering firm to substantiate this contention. Taxpayer never presented this study or any materials related to the study. The Auditor stated that the equipment was used in an exempt manner 47 % of the time. That would entitle Taxpayer to a 47% exemption.

### **FINDING**

Taxpayer's protest claiming a total exemption of the electricity is denied. Taxpayer's protest to the assessment of tax on 47% of the electricity is sustained.

### **3. Sales and Use Tax-Services**

#### **DISCUSSION**

Pursuant to IC 6-2.5-3-2, Indiana imposes a use tax on the "storage, use, or consumption of tangible personal property in Indiana." Indiana does not impose the use tax on the use of services in the state. Taxpayer protests the imposition of use tax on certain services such as a training class and design work. These sorts of services are exempt from the use tax.

The software maintenance agreements include software updates and upgrades that are tangible personal property. Under these agreements, Taxpayer may receive tangible personal property without additional consideration. This combination of taxable tangible personal property, canned software updates, and non-taxable services, software support, in a single contract represents a retail unitary transaction. Pursuant to IC 6-2.5-2-2, gross retail tax is imposed on retail unitary transactions.

### **FINDING**

Taxpayer's protest is denied as to the assessment of additional tax on the software maintenance agreements. Taxpayer's protest is sustained as to the assessment of additional tax on the other transactions in this category.

### **4. Sales and Use Tax-Tax Included in the purchase price**

#### **DISCUSSION**

Taxpayer protests the assessment of use tax on the value of several transactions where Taxpayer contends the sales tax was included in the purchase price. Taxpayer agrees that the transactions were subject to the Indiana sales/use tax. IC 6-2.5-2-1 (b) provides that taxpayers "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." This statute clearly states that the sales tax is to be listed separately and not included in the sales price of the tangible personal property. To receive credit for paying the sales tax and not be assessed use tax, Taxpayer must rebut the presumption that tax has not been paid.

### **FINDING**

This point of Taxpayer's protest is denied.

### **5. Tax Administration-Negligence Penalty**

Taxpayer's final point of protest concerns the imposition of the negligence penalty that was imposed pursuant to IC. 6-8.1-10-2 (a) which states as follows:

If a person fails to . . . pay the full amount of tax shown on his return on or before the due date for the return or payment, incurs, upon examination by the department, a deficiency which is due to negligence,. . . the person is subject to a penalty.

Even though Taxpayer had been audited several times in the past, Taxpayer had several areas of noncompliance with the law. Taxpayer also was careless and less than diligent in dealing with the utility information in particular. Taxpayer negligently failed to pay the proper tax to Indiana.

**FINDING**

Taxpayer's protest to the imposition of the negligence penalty is denied.